Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 356

BILLIE P. JONES, FORMERLY BILLIE P. SCHELLENBERGER, ADMINISTRATRIX OF THE ESTATE OF RALPH D. SCHELLENBERGER, DECEASED,

Plaintiff-Appellee,

vs.

JAMES A. SCHELLENBERGER,

Defendant-Appellee.

NOAH J. LaREAU, ADMINISTRATOR DE BONIS NON, IN THE PROBATE COURT OF COOK COUNTY, ILLINOIS, OF THE ESTATE OF RALPH D. SCHELLENBERGER, DECEASED,

Petitioner-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX.

	PAGE
Preliminary Statement	1-2
Opinion Below	2
Jurisdiction	2
Questions Presented	2-4
Statement of Facts	4
Specification of Errors	5
Reasons Relied on for Allowance of Writ	5-9
Conclusion	10
Appendix	1a-6a

CASES CITED.

Hoyt v. Sprague, 103 U. S. 613, 631	8
Lamar v. Micon, 112 U. S. 452, 470	8
La Salle National Bank v. Penn. R. R. Co., 8 F. R. D. 316, 317	7
Morgan v. Potter, 157 U. S. 195, 197	8

FEDERAL RULES.

Rule 17 (b) Federal Rules of Civil Procedure	3

STATE STATUTES.

Chapter 3, Section 419, Illinois Revised Statutes	3-4

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Petitioner-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Noah J. LaReau, respectfully prays for a Writ of Certiorari herein, to review the final judgment of the United States Court of Appeals for the Seventh Circuit, by which decision the said court affirmed

an order and decree of the United States District Court for the Northern District of Illinois, Eastern Division, which order and decree denied the motion of your Petitioner to be substituted as plaintiff in the cause pending in the United States District Court for the Northern District of Illinois.

The action was one based upon the right of a local administrator to be substituted as plaintiff in a pending cause begun by a foreign administrator, under Rule 17(b) of the Federal Rules of Civil Procedure and Section 419 of Chapter 3 of the Illinois Revised Statutes.

OPINION BELOW.

The Opinion of the United States Court of Appeals, for the Seventh Circuit, is printed in Appendix to this Petition.

JURISDICTION.

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered and filed on April 18, 1952. A petition for rehearing was filed May 1, 1952 and denied on June 19, 1952. Time for filing the Petition for Writ of Certiorari to this Court expires on September 17, 1952. The jurisdiction of this Court is invoked under its power to review decisions involving the interpretation of Federal Rules of Civil Procedure and the question of States' rights under Title 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED.

The question presented to this Court is the interpretation of Rule 17(b) of the Federal Rules of Civil Procedure, which makes applicable the State Statute of the State of Illinois, being Section 419 Chapter 3 of the

Illinois Revised Statutes; and the question of whether or not a State Court has the right to administer the assets of a decedent within its territorial jurisdiction.

THE FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

"Rule 17(b) Capacity to Sue or Be Sued:

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued *shall be* determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. Sec. 754 and 959 (a). As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."

THE STATE STATUTES INVOLVED

Chap. 3, Sec. 419 Illinois Revised Statutes.

"Right to sue." When no letters are issued in this state upon the estate of a non-resident decedent or ward an executor, administrator, guardian, or conservator to whom letters are issued on the estate by a court of competent jurisdiction of any state or territory of the United States may sue in this state in any case in which a resident executor, administrator, guardian, or conservator may sue. The court in which the suit is filed may order the non-resident executor, administrator, guardian, or conservator to give a bond

for costs as in cases of other non-residents. If after the proceedings are commenced letters are issued on the estate in this state, upon motion the resident executor, administrator, guardian, or conservator *shall be* substituted for the non-resident executor, administrator, guardian or conservator and the court shall hear and determine the matter as if originally instituted by the resident executor, administrator, guardian or conservator and the benefits of the judgment shall enure to and be assets in his hands."

STATEMENT OF FACTS.

The original suit was filed October 14, 1948 by Billie P. Schellenberger, now Jones, Administratrix of the estate of Ralph D. Schellenberger, deceased, on Letters of Administration issued out of the County Court of Dallas County, Texas, against the defendant, James A. Schellenberger, for an accounting and other relief of an alleged partnership between the deceased and the defendant.

Letters of Administration were subsequently issued by the Probate Court of Illinois to Noah J. La Reau on the same deceased to administer the assets of the deceased located in Cook County, Illinois. His Petition to be substituted as plaintiff in this pending suit was denied by decree of the District Court on September 20, 1951. La Reau predicated his right to be substituted as plaintiff on Rule 17(b), Federal Rules of Civil Procedure and Section 419, Chapter 3, Illinois Revised Statutes made applicable by the Rule.

The United States Court of Appeals for the Seventh Circuit affirmed that decree on April 18, 1952, and that decision the petitioner now seeks to be reviewed by this Court.

SPECIFICATION OF ERRORS.

1. The opinion of the United States Court of Appeals, for the Seventh Circuit, conflicts with the decisions of other United States courts in interpreting the Federal Rules' decisions, particularly in its interpretation of Rule 17(b).

2. The United States Court of Appeals for the Seventh Circuit erred in applying Rule 25 of the Federal Rules of Civil Procedure to the factual situation.

3. The Court erred in interpreting Section 419, Chapter 3 of Illinois Revised Statutes.

4. The United States Court of Appeals for the Seventh Circuit has misinterpreted the theory of the case, that being the right of State Courts to administer the assets of decedents within its territorial jurisdiction.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The question involved is one which arises and will continue to arise in all the States and involves the balance of judicial authority between the State and Federal Courts, which the Supreme Court has guarded against by setting up the Federal Rules of Civil Procedure.

2. The Court has treated Rule 17(b), Federal Rules of Civil Procedure, as discretionary, whereas by its very terms it is mandatory.

3. The case involves the right of a State Court to administer assets of a deceased person within its territorial jurisdiction.

4. The application of Rule 17(b) to the factual situation would not deprive the original plaintiff, Billie P.

Jones, of any of her rights as an individual. The Court controls litigation and not the parties.

In a suit in our Federal or State Courts, any party who has an interest in pending litigation has a right to be and may be made a party to the suit to protect his or her interest, and although it is not our province to suggest or point out to Billie Jones or counsel what proper steps to take, we do here and now say that Billie Jones, as a surviving spouse and the minor child, as heir-at-law, would have a right to be made additional parties individually to this litigation and to engage in the trial thereof, and it is for that reason we believe it is not necessary for the Court to make such an erroneous ruling with reference to the Rule 17(b), Federal Rules of Civil Procedure, and the Illinois Statutes, Section 419, Chapter 3.

The Rights of the States must be preserved and likewise the right of State courts to administer estates of decedents in its jurisdiction must be protected and maintained.

Noah J. LaReau, administrator *de bonis non,* in the Probate Court of Cook County, Illinois, of the Estate of Ralph D. Schellenberger, deceased, filed his Petition and on that Petition moved the Court to be substituted as plaintiff in this cause pending in the District Court for the Northern District of Illinois under the provisions of Rule 17 (b) of the Federal Rules of Civil Procedure, which provides as follows:

"b) Capacity to Sue or Be Sued:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organ-

ized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held.* * * *"*

Rule 17 (b) therefore, makes Section 419 of Chapter 3 Illinois Revised Statutes applicable as controlling the capacity to sue or be sued, which provides as follows:

> "Right to sue". When no letters are issued in this state upon the estate of a non-resident decedent or ward an executor, administrator, guardian, or conservator to whom letters are issued on the estate by a court of competent jurisdiction of any state or territory of the United States may sue in this state in any case in which a resident executor, administrator, guardian, or conservator may sue. * * * *If after the proceedings are commenced letters are issued on the estate in this state, upon motion the resident executor, administrator, guardian, or conservator shall be substituted for the non-resident executor, administrator, guardian, or conservator and the court shall hear and determine the matter as if originally instituted by the resident executor, administrator guardian or conservator and the benefits of the judgment shall enure to and be assets in his hands."*

The use of the words "shall be" in Rule 17 (b) of the Federal Rules of Civil Procedure makes it mandatory that capacity to sue or be sued be determined by the law of the State in which the district court is held, and that state being the State of Illinois, it is mandatory by the use of the words "shall be" in Section 419 of Chapter 3 of the Illinois Revised Statutes that the resident administrator be substituted for the non-resident administrator upon his motion to be so substituted.

The Court so held in the case of *LaSalle National Bank* v. *Pennsylvania Railroad Company*, 8 Federal Rules Decisions, 316 at page 317.

The assets being administered in that case was the cause of action on behalf of decedent's widow against the defendant under the Federal Employers Liability Act. The wording in Rule 17 (b) is unmistakable in that it says: "The capacity to sue or be sued *shall be* determined by the law of the state in which the District Court is held." The state in which the District Court is held in the matter before the Court is the State of Illinois. The language of the Statute of the State of Illinois, Chapter 3, Section 419, is unmistakable of interpretation in that it says: "If after the proceedings are commenced letters are issued on the estate in this state, upon motion, the resident administrator * * * *shall be* substituted for the non-resident administrator." It therefore, follows that the words *shall be* in the statute and in the rule of this Court, make the substitution of a resident administrator in proceedings such as here before the Court *mandatory.*

The Court said in the case of *Morgan* v. *Potter,* 157 U. S. 195, at page 197:

> "The authority of a guardian, like that of an executor or administrator appointed by the Court of one state, is limited to that state and he cannot sue in a court, even of the United States, held within any other state, except as so far as authorized by law." *Hoyt* v. *Sprague,* 103 U. S. 613-631, *Lamar* v. *Micou,* 112 U. S. 452/470.

The Federal Rules of Civil Procedure were prepared by an advisory committee appointed by order of the Supreme Court of the United States pursuant to an act of Congress empowering the Supreme Court of the United States to prescribe rules. Said rules to take effect after they have been reported to and approved by the Congress. *The rules are now in full force and have the effect of Statutory provisions.*

We find good reason for the rules and the application of them to particular situations. The provisions in Rule 17 (b) of the Federal Rules of Civil Procedure provide that in situations such as we have in this case, the "capacity to sue or be sued *shall be* determined by the law of the State in which the District Court is held." The law of the State of Illinois, by which this situation is governed, is found in the Statutes of the State of Illinois in Chapter 3, Section 419 that we have cited. This applies exactly to our situation in this case because proceedings were commenced by a non-resident administrator and after that was done a resident administrator was appointed in the Probate Court of Cook County, Illinois. Illinois Statute provides "If after the proceedings are commenced letters are issued on the estate in this State, upon motion the resident executor, administrator, guardian, or conservator shall be substituted for the non-resident executor, administrator, guardian or conservator and the Court shall hear and determine the matter as if originally instituted by the resident executor, administrator, guardian or conservator * * *".

The reason for the rule and the statutory provision made applicable to the situation by the rule is obvious, because the estate or assets of a non-resident decedent located in this State must be administered in this State either by a local administrator or by ancillary proceedings. The law says that when a resident administrator is appointed in this State, on motion he shall be substituted for the non-resident administrator, and the Court must, therefore, make the substitution and proceed to hear and determine the matter as if originally instituted by him. The language of the rule and the statute is unambiguous and unmistakable.

CONCLUSION.

The Petitioner, therefore, respectfully prays that the Court issue a writ of certiorari to the United States Court of Appeals, Seventh Circuit, directing it to certify the record in this cause to this Court for review.

Respectfully Submitted,

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RALPH F. BERLOW,
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Counsel for Petitioner.

APPENDIX.

OPINION BELOW.

April 18, 1952.

Before Major, Chief Judge, Duffy and Lindley, Circuit Judges.

Opinion by Major, Chief Judge.

Ralph D. Schellenberger, a resident and citizen of the State of Texas, died July 1, 1945, and left surviving him as his heirs at law and next of kin Billie P. Schellenberger, his widow, and a minor child, both of whom have since continuously been residents of the State of Texas. Letters of Administration were issued from an appropriate court of Texas, naming the widow as administratrix of his estate. As such administratrix, on October 14, 1948, she commenced, in the District Court for the Northern District of Illinois, a suit for an accounting and other relief against the defendant James A. Shellenberger, a brother of the decedent, the two of whom had been engaged as partners in a business in Chicago. It was alleged that plaintiff was a resident of the State of Texas and defendant of the State of Illinois and that the requisite amount was involved to confer diversity jurisdiction.

Defendant answered the complaint and set up what in effect was a plea in bar to the relief sought. In the meantime, plaintiff was married to one Jones and her name as plaintiff-administratrix was changed accordingly. On October 31, 1950, the court rendered a decision adverse to defendant's contention and directed that an accounting be rendered. In the meantime and upon petition of the defendant, one Thomas J. Phelan was ap-

pointed administrator of the decedent's estate by the Probate Court of Cook County, Illinois. On December 19, 1950, the Illinois administrator filed his appearance and moved that he be substituted as party-plaintiff. Before this motion was acted upon. Phelan resigned and the LaSalle National Bank was appointed as administrator *de bonis non.* The said bank filed a similar motion for leave to be substituted, but before the court acted thereon it resigned, and there was appointed by the same court the instant appellant, Noah J. LaReau, as the second administrator *de bonis non,* who renewed the motion for substitution. The matter was referred to a Master-in-Chancery who, after a hearing, rendered a report and recommended that the motion for substitution be denied. The appellant objected to the report of the Master, which objections were, on September 20, 1951, overruled by the court, and a decree was entered denying appellant's request to be substituted as party-plaintiff. From this order the appeal comes to this court.

The sole question preesnted on this appeal is whether the court erred under the circumstances in refusing to allow the substitution of the Illinois administrator as party-plaintiff for and in place of the Texas administratrix.

Appellant contends that the court had no discretion in the matter but was under a mandatory duty to allow such substitution, and relies entirely upon Rule 17(b) of the Federal Rules of Civil Procedure, entitled "Capacity to Sue or Be Sued" in connection with Sec. 419, Chap. 3 (Ill. Rev. Stats. 1949), entitled "Right to Sue."

Rule 17(b) provides, so far as here material:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued

shall be determined by the law of his domicile, The capacity of a corporation to sue or be sued shall be determined by the law under which is was organized. In all *other cases* (italics ours) capacity to sue or be sued shall be determined by the law of the state in which the district court is held * * *."

Obviously, plaintiff having sued in her representative capacity comes within the category of "other cases."

The Illinois statute relied upon as "the law of the state" evidently makes provision for two situations, (1) where no letters of administration have been issued in the State at the time an action is commenced by a foreign administrator, and (2) where a local administrator is appointed subsequent to the commencement of the action. As to the first situation, the statute provides:

> "When no letters are issued in this state upon the estate of a non-resident decedent or ward an executor, administrator, guardian, or conservator to whom letters are issued on the estate by a court of competent jurisdiction of any state or territory of the United States may sue in this state in any case in which a resident executor, administrator, guardian, or conservator may sue."

As to the second situation, the statute, so far as here material, provides:

> "If after the proceedings are commenced letters are issued on the estate in this state, upon motion the resident executor, administrator, guardian, or conservator shall be substituted for the non-resident executor, administrator, guardian, or conservator * * *."

Thus, it is plain the provision as to the first situation relates only to the capacity to sue, and as to the second situation to the right of substitution by a local administrator appointed subsequent to the commencement of the action. It should be kept in mind that Rule 17(b) relates solely to "Capacity to Sue or Be Sued," and

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Campbell, et al., 73 F. Supp. 112
v. *United States*, 59 F. Supp. 1

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pp. 107, 109; *Suders* v.
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The only case called to our attention or which we are able to find in which the question before us has been discussed is *LaSalle National Bank* v. *Pennsylvania R. Co.*, 8 F.R.D. 316. While the court there uses some language favorable to appellant, the fact is that the only question which the court had before it was which of two administrators, each of whom had brought suit on the same cause of action, should be permitted to proceed, the suit having been commenced by a local administrator prior to that by the foreign administrator. The question was raised at an appropriate time by the local administrator and the court held that the foreign administrator was without capacity to mintain the suit. We think this holding was correct, although there is some language in the opinion to which we do not subscribe.

Our view that Rule 17(b) is not concerned with the right of substitution is strengthened, so we think, by the fact that Rule 25, entitled "Substitution of Parties," prescribes in detail the circumstances under which substitution is permissible. It is hardly likely that the rule-makers would have treated the matter of substitution in piecemeal fashion. It is more reasonable to think that they treated the matter of "Capacity to Sue" and that of "Substitution" as separate and distinct. The former was covered by Rule 17(b) and the latter by Rule 25.

The Rules of Civil Procedure are designed to prescribe the procedure in Federal courts. The question of substitution of parties is procedural, recognized by the rules as such, and not controlled or governed by local law. Particularly is this so in the absence of a specific requirement to that effect and, as we have shown, there is no such requirement in Rule 17(b), relied upon by appellant.

If appellant as the Illinois administrator has any interest in the accounting which defendant has been ordered

to make, for the purpose of protecting Illinois creditors or for other good reason, we have no doubt but that the court upon a proper showing would permit intervention, and what we have said is without prejudice to any right he may have in this respect.

Plaintiff argues that the Illinois statute (to which we have heretofore referred) is unconstitutional if applied as appellant would have us do. We think this contention is not without merit in view of the recent decision of the Supreme Court in *First National Bank of Chicago, etc.* v. *United Air Lines, Inc.,* decided March 3, 1952. Appellant's contention, if accepted, would mean that plaintiff as a foreign administrator has been granted the right to commence her action, pursue it to a point of a favorable decision on the merits, and at that point deprive her of the right to proceed further, under the pretext that her capacity to sue has been withdrawn. In view of what we have held, it is not necessary, however, and we refrain from deciding the constitutional question.

The order denying appellant's motion to be substituted as a party plaintiff is Affirmed.

5

IN THE

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vs.

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Defendant-Appellee.

NOAH J. LaREAU, Administrator De Bonis Non,

Petitioner-Appellant.

BRIEF AND ANSWER OF BILLIE P. JONES, PLAINTIFF-APPELLEE, TO THE PETITION FOR WRIT OF CERTIORARI OF NOAH J. LaREAU, ADMINISTRATOR DE BONIS NON, PETITIONER-APPELLANT.

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Brief and Answer 1

History and Status of Case 2-4

Argument 5-8

Cases Cited:

First National Bank v. United Air Lines, 342 U. S. 396 6-7

Ruhlin v. New York Life Insurance Co., 304 U. S. 202 7

Magnum Import Co. v. Coty, 262 U. S. 159 7

Cooper v. American Air Lines, 149 Fed(2) 355, 359 8

Wallan v. Rankin, 173 Fed.(2) 488 8

Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33 8

McClelland v. Carlin, 217 U. S. 286 8

U. S. v. Rimer, 220 U. S. 547 8

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Respondent, Billie P. Jones, plaintiff-appellee, resists the petition for a writ of certiorari, and in opposition and answer thereto submits that for reason of clarity it is important to delineate the history and status of the case at issue, which resulted in the judgment of the United States Circuit Court of Appeals' decision denying petitioner-appellant his motion in the District Court to be substituted as plaintiff.

HISTORY AND STATUS OF CASE.

1. A complaint and amendment thereto was filed October 14, 1948 to compel an accounting by the defendant as the surviving partner of assets of partnership property, formerly belonging to decedent and defendant as sole partners. The complaint alleged diversity of citizenship of the parties and the requisite amount existing under federal jurisdictional requirement.

2. The defendant, James A. Schellenberger, answered the complaint as amended, admitted the partnership, but relied mainly as his defense on certain provisions of the partnership agreement which, *inter alia,* expressly provided that in the event of the death of either partner a joint tenancy was intended of said partnership assets and for survivor to take all.

3. The plaintiff below thereupon moved to strike the affirmative defense of the answer, contending that joint tenancy survivorship provisions to partnership assets are void as (a) being contrary to public policy, (b) contrary to the statute of wills, and (c) contrary to the Uniform Partnership Act of Illinois. Chapter 106½, Illinois Revised Statutes.

4. On April 5, 1950, upon briefs submitted, the district court by a Memorandum and Order sustained plaintiff's motion to strike the affirmative defense and referred the cause to Master Joseph F. Elward to hear and determine the issues.

5. September 28, 1950, the Master, upon evidence adduced by plaintiff, filed his well-considered original report, finding all issues in favor of plaintiff.

6. Exceptions to said Master's report were filed and overruled by a supplemental report dated October 17, 1950.

7. Briefs were again submitted to the Court on defendant's exceptions which were pending for decision, and before the Master's Second Supplemental Report was rendered, the defendant, James A. Schellenberger, (after the hearings of evidence before the Master, in which the defendant testified in person as well as being represented by his counsel), on September 11, 1950, (which is more than five years after the death of the deceased partner which occurred July 1st, 1945) filed a petition in the Probate Court of Cook County, Illinois, setting up the death of his partner and nominated Thomas J. Phelan, Administrator, and the latter filed an inventory which alleged that decedent had assets consisting of an undivided one-half interest in the partnership, which interest was made the very subject matter of the litigation in Federal Court and which interest the defendant theretofore contested and denied by claiming it as his own under joint-tenancy survivorship.

8. Thereupon and promptly after his appointment as Administrator in the Probate Court of Cook County, Illinois, Thomas J. Phelan moved in Federal Court, in the instant litigation, to be substituted as plaintiff.

9. While the motion for substitution was pending, Thomas J. Phelan resigned and LaSalle National Bank was appointed Successor Administrator in the Probate Court of Cook County, Illinois, and the latter bank, when it discovered that there was pending a motion for substitution of plaintiff in the Federal District Court, sensed its implications and promptly resigned. Thereafter Noah J. LaReau was appointed Successor Administrator and he joined and pressed the motion for substitution of plaintiff previously filed by Thomas J. Phelan, first Administrator.

10. The motion for substitution came for hearing before the Honorable Judge Barnes who by an order entered referred the motion to Master Joseph F. Elward for hearing and recommendation.

11. "Findings of Facts and Conclusions of Law" were filed by the Master, which, *inter alia,* contains the following:

> "It is my conclusion that under the circumstances of this case and the present state of the record it would be an *abuse of discretion* to allow the Illinois Administrator, (Noah J. LaReau, Successor Administrator of the Estate of Ralph D. Schellenberger, deceased, under letters of administration from the Probate Court of Cook County, Illinois) *to be substituted* as plaintiff instead of Billie P. Jones, the Texas Administrator, and that an order should be entered accordingly." • • • (Emphasis ours.)

12. Pursuant to the Master's recommendation, a decree was entered on September 20, 1951, which inter alia denied petitioner-appellant the right to be substituted as plaintiff. Said decree was affirmed by the Circuit Court of Appeals of the Seventh Federal Circuit.

13. Petitioner-appellant is now seeking, through the petition for a writ of certiorari, to review said final judgment of the Federal Circuit Court of Appeals.

ARGUMENT.

From the statement of facts hereinabove recited, it is apparent that respondent-appellee when she instituted her action against the defendant, James A. Schellenberger, for accounting, had the undoubted right to an account of the partnership estate by reason of the death of one of the partners, and said action for accounting had as its objective an accounting, (a) to the date of death of her decedent husband, and (b) an accounting from date of death to the date of the rendering of such account under a state statute, which provides that the legal representatives of a deceased partner may sue and at their option recover profits attributable to the use of partnership assets. (Chapter 106½, Section 42, Illinois Revised Statutes.)

Petitioner-appellant at page 2 of his petition states as follows:—

"QUESTIONS PRESENTED

> The question presented to this Court is the interpretation of Rule 17(b) of the Federal Rules of Civil Procedure, which make applicable the State Statute of the State of Illinois, being Section 419, Chapter 3 of the Illinois Revised Statutes; and the question of whether or not a State Court has the right to administer the assets of a decedent within its territorial jurisdiction."

At page 5:

> 3. "The case involves the right of a State Court to administer assets of a deceased person within its territorial jurisdiction."

The above quoted statements are erroneous and inaccurate. The question is not whether a state court has the right to administer assets of a deceased person within its territorial jurisdiction. It is conceded that state courts have such right. That unquestioned right was not presented to the Circuit Court of Appeals for decision, and hence cannot be made the subject matter of the petition for review.

The very opinion of the Circuit Court of Appeals repudiates petitioner's premise contained in his "Questions Presented". In said opinion, the Court said:

> "If appellant as the Illinois administrator has any interest in the accounting which defendant has been ordered to make, for the purpose of protecting Illinois creditors or for other good reason, we have no doubt but that the Court upon a proper showing would permit intervention, and what we have said is without prejudice to any right he may have in this respect."
>
> (pp. 5a, 6a of Appellant's Petition.)

It is obvious that the Circuit Court of Appeals' decision did not deal with the State right to administer decedent's estates under local law. What the decision did decide was a procedural question only, namely: May a local administrator, while a cause is pending in a federal court oust the plaintiff and be substituted after his appointment in a local court under Rule 17(b) of Federal Rules of Civil Procedure, or under a state statute which says "shall" be substituted?

Our Circuit Court of Appeals decided that question properly in accordance with federal law and the decisions of our highest Court.

The word "shall" of the state statute has been considered by this Honorable Court in the case of ***First Na-***

tional Bank v. *United Air Lines,* 342 U. S. 396, and Justice Jackson, in a concurrent opinion, at page 400, states the law clearly:

> "It is indeed fanciful to suggest that a state statute relating to the power of its own courts is an applicable 'rule of decision' under this statute, when Congress in passing the federal jurisdictional grant has specifically 'otherwise required and provided'. 28 U.S.C. Sec. 1332(a)(1). The petitioner enters the federal court *not by the grace of the laws of Illinois but by grace of the laws of the United States.*" (Emphasis supplied)

Respondent adopts the historic and classic language above quoted as her reason for resisting the petition for a writ of certiorari.

Moreover, the petition of appellant for certiorari fails to comply with the rule announced in *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 206, in that it fails to show as a basis for certiorari where a Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions", or that the decision involves "a federal question in a way probably in conflict with applicable decisions of this Court", pursuant to Rule 38(5)(b), of U. S. Supreme Court Rules.

Appellant's petition for certiorari further fails to set out matters showing that questions of importance are involved which it is *in the public interest* to have decided by this Honorable Court of last resort, as his reason for the granting by this Court of the writ of certiorari in accordance with the decision of *Mangum Import Co.* v. *Coty,* 262 U. S. 159, 164.

It may further be added that Rule 17(b) of Federal Rules of Civil Procedure and state statutes covering administration of decedents' estates have been clearly de-

cided adversely to petitioner's contention, in *Cooper* v. *American Airlines,* 149 Fed. (2) 355, 359; *Wallan* v. *Rankin,* 173 Fed. (2) 488.

When the case at bar was originally filed it was predicated on the doctrine that federal courts of chancery exercise original jurisdiction (proper diversity of citizenship and the requisite amount existing) in favor of creditors, legatees, and heirs to establish their claims. Such jurisdiction cannot be limited or curtailed by State Legislation.

Waterman v. *Canal-Louisiana Bank Co.,* 215 U. S. 33, 43.

McClelland v. *Carlin,* 217 U. S. 268, 281.

CONCLUSION.

Considering the record, this Honorable Court will readily conclude that in granting the petition of Appellant for a Writ of Certiorari, it would review the decision of the Circuit Court of Appeals (7th Circuit) in regard to a question as to which, under the Judiciary Act of 1891, the action of the Court was final, and which neither from its character or importance, is within the scope of the grant of power to review by certiorari.

For the aforegoing reasons, respondent-appellee, respectfully submits that the petition of Noah J. LaReau, petitioner-appellant for a Writ of Certiorari be denied and, if granted, should be dismissed on merits, on the authority of *U. S.* v. *Rimer,* 220 U. S. 547.

Respectfully submitted,

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